

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 24

INDUSTRIAS VASSALLO, INC.

Employer

and

SOLIDARIDAD GENERAL DE TRABAJADORES
DE PUERTO RICO

Petitioner

Case 24-RC-8461

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, ("the Act"), a hearing was held on May 19, 20, 24, 2005 and June 1 and 2, 2005, before a hearing officer of the National Labor Relations Board, ("the Board"), to determine whether a question concerning representation exists, and if so, to determine an appropriate unit for collective bargaining.¹ Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

¹Upon the entire record in this proceeding the undersigned finds:

a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

b. The parties stipulated, and I find, that the Employer, Industrias Vasallo, Inc., is a Puerto Rico corporation engaged in the manufacture of PVC products, with a principal place of business in Ponce, Puerto Rico. During the last twelve months, a representative period, the Employer derived gross revenues in excess of \$500,000 and purchased and received at its Ponce, Puerto Rico facility, goods and materials valued in excess of \$50,000 directly from points and places located outside of the Commonwealth of Puerto Rico.

c. The parties stipulated, and I find, that Petitioner, Solidaridad General de Trabajadores de Puerto Rico (hereinafter "Petitioner or Union"), is a labor organization within the meaning of Section 2(5) of the Act.

I. THE ISSUE

The sole issue presented in this case is whether the individuals that transport the Employer's products are independent contractors or employees within the meaning of the Act.²

II. DECISION

After considering all of the evidence in the record, the applicable legal authorities, and the parties' briefs in support of their respective positions, I find that the individuals sought herein are independent contractors and not employees and that the unit is therefore inappropriate. Accordingly, I shall dismiss the petition.

III. STATEMENT OF FACTS

A. Overview of the Employer Operations

The Employer is engaged in the production of pipes, fittings, shears, water tanks and other products made out of Polyvinyl Chloride (PVC) at its plant located in Ponce, Puerto Rico where it employs approximately 297 employees in all phases of its operations including production, marketing, client service, administration, research and development. The record reflects that the Employer has contracted with 21 individuals³ known as "carriers" and that these carriers have a total of 33 trucks. With the exception

d. The Petitioner claims to represent certain employees of the Employer. Consistent with the determination discussed above, no question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

²The Petition requested the following unit: INCLUDED - All chauffeurs and drivers working for Industrias Vassallo, Inc., in the transportation of plastic products to different points in Puerto Rico from its manufacturing plant in Ponce, Puerto Rico. EXCLUDED - All guards, executives, supervisors, production employees and clerical employees, as defined in the Act. The Petitioner amended the unit description at the hearing to clarify that its proposed unit includes truck drivers who own their trucks and have a transportation contract with the Employer and truck drivers hired by such truck owners to drive their trucks.

³The parties stipulated that during the past five-year period the Employer had signed contracts with approximately 25 separate carriers. At the time of the hearing this number had been reduced to 21 and no contracts were in effect; the last extension expired on April 25, 2005. The parties stipulated that the contracts had not been renewed after this date. The parties did not

of three carriers, who do not drive any of their own trucks but instead hire truck drivers to perform the work, all other carriers own and operate their own trucks. The record also reflects that some carriers⁴ own more than one truck and hire their own drivers for the additional trucks they possess.⁵

B. Assignment of Trips

The record reflects that the Employer's products are delivered from its warehouse that is opened for loading purposes on Mondays through Fridays from 8:00 a.m. to 4:00 p.m. and on some Saturdays from 8:00 a.m. to 12:00 noon. The assignment of trips depends on customer demand and the availability of truck size and type. Thus, depending on the size of the order, the warehouse supervisor determines the type of truck unit needed and directs the company security guard to communicate the specific need to the waiting carriers. The carriers then distribute the trips among themselves pursuant to a carrier devised system based on truck type and order of arrival. Carriers maintain two lists, one for open vans and another for open large and platform trucks. Because there are only two units for the smaller closed van and two units for the larger closed trucks, these carriers determine among themselves the order for delivering the next shipment.

With regards to open vans, large or platform trucks, the record reflects that carriers devised a system whereby upon arrival they register their names and the type of

present any evidence however, regarding the Employer's operations at the time of the hearing or whether the individuals sought herein had continued to transport the Employer's products.

⁴The record reflects that carriers Jose Mandonado and Victor Luna own four trucks; carrier Wilfredo Marrero owns three trucks and that carriers Luis Zengotita, Elvin Meléndez, Roy Maldonado and Yamil Vera each own two trucks. At the hearing the Petitioner further clarified that it was seeking to represent both the individual carriers and the truck drivers who were hired by them, but not those carriers who do not drive their trucks. In total, there are 29 individuals in the petitioned unit, consisting of 18 individual carriers, and 11 truck drivers employed by them.

⁵Because of the kind of merchandise that the Employer sells, it has required carriers to provide a variety of trucks such as (1) closed small trucks or vans, (2) larger trucks, either closed box, or

truck they possess on a list kept by the company security guard. In this respect there are two lists one for the open vans, and another for the open larger trucks. By their own rules, the truck drivers write down their names on the lists after the loading for the day is over, or around 5:00 p.m. to take a trip for the next day. The Employer assigns the destinations to the carrier who is next in line, and notifies the carrier or its designated driver of any appointments made with the clients for the delivery time. As noted, the driver chosen to make the delivery is determined by the order that he appears on the list.

The record reflects that there is no dispute that carriers may refuse any deliveries without any adverse consequences resulting from their refusal. Thus, the carriers themselves have agreed to place any carrier on the bottom of the call list when they refuse to provide the delivery when called to do so. It is also undisputed that the carriers monitor compliance with the turns established by these lists. Thus, the Employer is not involved in monitoring compliance with the turns or shifts nor establishes any zones, routes or specific clients to any carriers.

C. Expenses and Responsibilities Associated with the Transportation Activity

The record reflects that each of the individual carriers holds the title to the trucks they own and operate. In this respect each truck owner is independently authorized by the Commonwealth of Puerto Rico Public Service Commission ("PSC") to provide land freight transport services within Puerto Rico. The Employer does require that carriers maintain and renew all applicable permits and licenses and pay and maintain any liability and property insurance policies required by law for the operation of their freight trucking business. The record also reflects that according to their contract with the Employer carriers are responsible for obtaining any necessary equipment to safeguard the

open with side fencing covering the merchandise with a cloth, and (3) 40 feet platform trailer trucks.

property transported and assume any risks associated with the transportation of the Employer's products. In the event that the Employer's property is damaged in the possession of the individual truck-owner or its designated driver, the carrier is responsible for the payment of any loss associated with said service. The carriers also pay any fines imposed by any regulatory agencies for the delivery of the Employer's products. Finally, the carriers must purchase their own tools needed for the services provided.

It is undisputed that the Employer does not provide nor own any of the trucks the carriers use for the transportation services provided. In this respect the Employer does not provide discounts on any trucking-related expenses, and it is not authorized by the applicable authorities to be involved in the business of cargo transportation. Carriers also pay all the costs of maintenance and repairs needed for their trucks. They are responsible for covering the recurring expenses associated with tolls, gasoline, oil and tires. They are free to select the location where they will get these services. In this respect, the Employer does not offer any discounts, loans, or monetary assistance to the carriers in order to acquire the trucks. Also, the carriers are responsible for paying any improvements, repairs, costs, or lease of their trucks, and receive no assistance from the Employer in this regard. The carriers are free to sell their trucks, to seek new clients, to hire their own truck drivers for any trucks they own, and are not limited in these enterprises by the Employer.

Also, for each of the drivers assigned to drive any of their trucks, the carriers pay for the employee's social security, public liability and freight insurance, workmen's compensation insurance, licenses, permits and fees. The carriers are also responsible for assuring that these drivers comply with all applicable Commonwealth laws, rules and regulations. The carriers provide the training for any driver they hire, and are responsible for the wages of this employee according to rates negotiated solely between

the truck owner and their employee. It is also undisputed that the Employer is not involved in any way in the hiring of the carriers' drivers nor paid directly by the Employer.

D. Working Conditions

The record reflects that the Employer does not exercise any control over the details of the carriers' daily work performance. In fact, by the terms of the "Transportation Contract" the Employer prohibits the carriers from wearing uniforms, symbols, insignias or any other identification associating them with the Employer. It is undisputed that the trucks used by the carriers are not identified with the Employer in any way. Instead, the trucks bear the name and permit number issued by the PSC to the individual carriers. Some carriers have an independent business name and do business under an independent business logo; others use their personal name for the trucking business.

The carriers are not supervised by anyone employed by the Employer. The Employer does not establish any particular route to be used by the carriers. The carriers or their employees are free to select the best route to reach their destination. There is no radio communication system with the drivers while they are on the road, but drivers are required to call the Employer if any situation arises during the delivery, so the Employer can address the situation and deal with the clients if necessary. Further, other than the regular warehouse operation there is no specific starting or quitting time, shift schedule, lunch or rest period and neither the individual carriers nor their drivers are required to register their attendance, punch a time clock or sign any time-sheets.

With regard to other traditional employment matters, the record reflects that the Employer does not provide training and that each carrier trains their own drivers. Contrary to what is required of its employees, the Employer does not require job applications for any of the carriers or their truck drivers. Unlike the Employer's plant employees, none of the carriers is required to undergo drug testing. Carrier discipline is

relegated to personal civility and compliance with Employer's regulations regarding the efficient operation of its warehouse. In this regard the record reflects that the Employer does not establish an escalated system of discipline, maintain any reliable documentation of prior disciplinary actions, keep personnel files on any carriers or their drivers. Rather, the only files maintained relate to documentation regarding carrier permits, licenses, and insurance coverage; the same documentation kept on miscellaneous other service providers.

As noted above, the record shows that some carriers have hired their own drivers and independently establish their terms and conditions of employment. In this regard there is no dispute that the decision to hire, fire, the amount or frequency of pay as well as other terms and conditions of employment are negotiated and established between the carrier and driver. The record also reflects that the Employer does not pay social security, disability, vacation, sick leave or Christmas bonus to any of carriers nor the drivers that they hire. Rather, all of these payments and/or benefits are paid by, and are the responsibility of, the carriers.

E. Payment for Services

The record reveals that the Employer negotiated with the carriers the rates paid for transporting its products based on a fixed rate per trip made. This rate is not based on an hourly rate but on one that includes geographical delivery area and the number of deliveries made in such area. The Employer does not make any deductions from the sums that it pays its carriers except for 7% that Puerto Rico law mandates the Employer to deduct from the payments made to independent contractors for services rendered.

The record reveals that payments to carriers are made every Friday and are based on the number of signed invoices that carriers or their drivers submit during the week. It is undisputed that the checks are issued in the individual carrier's name regardless of the driver who performed the work. The three carriers that do not drive

their own trucks make weekly visits to pick-up their checks. Once paid, the carriers in turn pay their own drivers according to the terms that they agreed to with the drivers. Finally, because the checks are based on the number of trips made by each of the trucks owned by the different carriers, those carriers that own more than one truck receive several checks corresponding to the trips made by each truck that they own.

F. Entrepreneurial Opportunities Enjoyed by the Carriers

It is undisputed that some of the carriers enjoy various entrepreneurial opportunities aside from the income that they earn from the trucking services provided to the Employer. Thus, all carriers are independently authorized by the local licensing authority to perform trucking services in Puerto Rico and there is no express or implied limitation to their performing similar services to any other entity. Thus, subject only to entrepreneurial decisions, the carriers can decide the entities that they themselves select to do business with on a regular basis. In this regard carriers such as Yamil Viera, José R. Maldonado and Luis Zengotita actually performed similar services for other unrelated entities and Mr. Zengotita himself even worked for an unrelated employer as a driver and operated a short-lived barbeque business at the same time that he provided trucking services for the Employer with drivers that he had hired.

Finally, it is also undisputed that the carriers are allowed to incorporate their own businesses and openly seek additional clients for their freight transportation business. In this regard, the record reflects that at least two carriers had business names for their respective freight transportation business. Carrier Jose R. Maldonado operates his business as J.R. Transport, Inc. and carrier Wayne González sometimes operated his business under the name of TransWayne.

IV. DISCUSSION

In *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968), the Supreme Court held that the common-law agency test is used to distinguish an employee from an

independent contractor. This test requires that “all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *Id.* The following factors are considered:

- a. The extent of control which the master may exercise over the details of the work;
- b. Whether or not the one employed is engaged in a distinct occupation or business;
- c. The kind of occupation, and whether the work is usually done under the direction of the employer or by a specialist without supervision;
- d. The skill required in the particular occupation;
- e. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- f. The length of time for which the person is employed;
- g. The method of payment, whether by the time or by the job;
- h. Whether or not the work is a part of the regular business of the employer;
- i. Whether or not the parties believe they are creating the relation of master and servant; and
- j. Whether the principal is or is not in business.

When applying this analysis, the Board has rejected the argument that the predominant factor is the “‘right to control’ the manner and means of the work performed by the individual whose status is at issue.” *Slay Transp. Co., Inc.*, 331 NLRB 1292, 1294 (2000) (and cases cited therein). Consequently, “all incidents of the relationship” are taken into account. *Id.*, see also *Roadway Package System, Inc.*, 326 NLRB 842, 850 (1998) (“[T]he common law agency test encompasses a careful examination of all factors and not just those that involve a right to control.”)

In *Dial-A-Mattress Op. Corp.*, 326 NLRB 884 (1998), the Board found that the truck drivers/owner-operators providing delivery services for Dial-A-Mattress, a company involved in the sale of bedding and mattresses, were independent contractors. These owner-operators had formed their own trucking companies, and were authorized by the State Department of Transportation to transport Dial's products. The owner-operators employed helpers for whom they maintained workers' compensation insurance. *Id.*

Dial's owner-operators hauled for other companies. When performing deliveries for Dial, each owner-operator was required to display his corporate name and address and the Department of Transportation number on the truck's cab doors. *Id.* The owner-operators and their employees were not subject to the work rules that applied to Dial's employees, and Dial in fact kept no record of the employees hired by the owner-operators. *Id.* at 888.

In *Dial*, 326 NLRB at 891, the Board noted that the relationship between Dial and the owner-operators was structured in such a way that allowed the owner-operators to make an entrepreneurial profit beyond a return on their labor and their capital investment, factors that indicated the independent contractor status. Among these, the Board noted that the owner-operators arranged for their own training, hired their own employees, and had sole control over and complete responsibility for their employees, including setting their terms and conditions of employment. Dial also played no part in the selection, acquisition, ownership, financing, inspection, or maintenance of the vehicles used by the owner-operators. There was no minimum compensation guaranteed to the owner-operators to minimize their risk of performing deliveries for Dial, and they could decline orders without penalty. The owner-operators were not required to provide delivery services each scheduled workday. *Id.* Several owner-operators owned more than one vehicle. For each additional truck, the owner-operators employed one driver and a helper. While most owner-operators drove their own vehicles, three

owner-operators did not drive at all, but employed a driver. *Id.* at 885. In short, the Board noted that the owner-operators' separateness from Dial was manifested in many ways, including significant entrepreneurial opportunity for gain or loss. *Id.* at 891.

Similarly, in this case, all the factors of the relationship between the owner-operators and the Employer unmistakably indicate the status of independent contractor for the petitioned truck owners. Little difference can be shown between the carriers who owned trucks but did not drive any of them, and the other carriers or owner-operators who drove their own trucks, in terms of assignment of work, working conditions, payment terms, and entrepreneurial opportunity afforded by the Employer.

The record shows that entrepreneurial opportunities are amply afforded to the carriers. Not only are they the rightful owners and titleholders of the trucks they use to perform services for the Employer, each is also independently authorized by the PSC to engage in the business of freight transportation in Puerto Rico, and they are not restricted in any way in the performance of these services by the Employer. The Employer owns no trucks, and has not sought authorization from the PSC to perform trucking services.

Additionally, some of the carriers have hired employees to drive their trucks. The carriers sell, exchange, or improve the trucks they drive at any time, and at their sole discretion. They also may acquire additional trucks if they see fit, without restriction by the Employer. The carriers are solely responsible for the maintenance and repairs of the trucks. They are responsible for all expenses associated with the trips including tolls and gasoline. The Employer does not provide any assistance to the carriers for the obtainment of services nor for that matter, discounts to purchase any products. The Employer does not supply the truck owners with any tools for the performance of their work. They are also required to purchase any canvas or other materials they may need for the transportation of special merchandise.

The truck owners, or their truck drivers, are not identified with the Employer in any way. The trucks bear the individual truck owner's name and authorization or permit number in a visible location. The truck drivers do not wear uniforms provided by the Employer. The truck owners may refuse a trip at any time, or may alternate services to other companies with services that they provide to the Employer. In sum, the individual truck owners or carriers enjoy many of the privileges and responsibilities and the entrepreneurial control over their operations that are characteristic of independent contractor status, and they are not restricted by the Employer in the exercise of these entrepreneurial opportunities. Accordingly, I find that the individuals sought by petitioner are independent contractors and not employees.

V. ORDER

It is hereby **ORDERED** that the petition filed herein be, and it hereby is **DISMISSED**.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570. This request must be received by the Board in Washington by July 1, 2005.

Dated at San Juan, Puerto Rico, this 17th day of June, 2005.

/s/

Marta M. Figueroa
Regional Director, Region 24
National Labor Relations Board

